Central States Southeast and Southwest Areas, Health & Welfare and Pension Funds *and* Local 743, International Brotherhood of Teamsters. 13–CA–117018

August 4, 2015

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

On June 5, 2014, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] only to the extent consistent with this Decision and Order.

This case centers on an employer's reaction to an employee's act of posting a written disciplinary warning. Specifically, the General Counsel alleged that the Respondent violated Section 8(a)(1) of the Act by threatening employee Frederick Allen Moss with a 3-day suspension unless he removed a written disciplinary warning that he had posted in his work area. The General Counsel further alleged that this conduct separately violated Section 8(a)(1) inasmuch as the Respondent orally promulgated an unlawful work rule of general application. The judge declined to find either alleged violation and dismissed the complaint. We reverse the judge and find both violations for the following reasons.

I. FACTS

The Respondent administers the health, welfare, and pension plans for various employers. For the past 21 years, Moss has worked in the Respondent's call-in center, where he answers telephone inquiries by fund participants. Department Manager Cynthia McGinnis has supervised Moss for the past 7 years. The parties stipulated that McGinnis is both a statutory supervisor and an agent of the Respondent.

During a meeting on June 12, 2013,[2] Moss apparently failed to stop using a tablet (or similar electronic device) when McGinnis told him to do so. On June 13, McGinnis held a disciplinary meeting with Moss, Union Steward Rick Delgado, and another supervisor. At this meeting, McGinnis issued Moss a written warning based solely on Moss's alleged failure to comply with her directive to put his tablet away. Immediately after this meeting, Moss discussed the warning with Delgado, and, the following day, Moss showed the warning to several other employees. Thereafter, he laminated the written warning and posted it in his cubicle, next to his computer. The laminated warning was visible to other employees entering his cubicle or standing at the entry to the cubicle. The Union filed a grievance concerning the warning on July 2.[3]

The Respondent and the Union held a grievance hearing on August 15 concerning the July 2 grievance. In attendance were Director of Participant and Field Services William Schaefer, Director of Human Resources Scott Robbins, and McGinnis, as well as Moss, Union Business Agent Catherine Schutzius, and four union stewards (including Delgado). During the grievance hearing, McGinnis complained that Moss was being disrespectful and insubordinate to her by posting the written disciplinary warning. Schaefer interjected and told Moss that if he did not remove the warning from where he posted it, then Schaefer would suspend Moss for 3 days. The Union advised Moss to comply with Schaefer's demand. Moss went to his cubicle and took down the written warning.

II. ANALYSIS

A. The Threat to Discipline Moss

As the Supreme Court has stated, the Board has long "recognized the importance of freedom of communication to the free exercise of organization rights." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972) (citations omitted); see also *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999) (quoting *Central Hardware* and finding unlawful an overbroad confidentiality rule prohibiting employees from discussing their discipline with coworkers). Following from this principle, the Board has found that "[i]t is important that employees be permitted to communicate the circumstances of their discipline to their coworkers so that their colleagues are aware of the nature of discipline being imposed, how they might avoid such discipline, and matters which could be raised in their own defense." *Phillips Electronics North America Corp.*, 361 NLRB No. 16, slip op. at 2 (2014) (quoting *Verizon Wireless*, 349

[1] We have amended the judge's Conclusions of Law consistent with our findings here.

[2] All dates refer to 2013 unless otherwise indicated.

[3] The parties stipulated to this date, and the grievance itself is dated July 2. Therefore, we conclude that the judge erred in finding that the grievance was filed on June 13.

NLRB 640, 658 (2007) (finding 8(a)(1) violation where employer created overbroad rule by prohibiting an employee from speaking with coworkers about a written disciplinary warning under pain of further discipline or discharge)). As a result, the Board has consistently held that "[a]n employer violates Section 8(a)(1) when it prohibits employees from speaking with coworkers about discipline and other terms and conditions of employment absent a legitimate and substantial business justification." *Phillips Electronics*, 361 NLRB No. 16, slip op. at 2 (citing *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 7 (2014); *SNE Enterprises*, 347 NLRB 472, 491–492 (2006), enfd. 257 Fed.Appx. 642 (4th Cir. 2007); *Caesar's Palace*, 336 NLRB 271, 272 (2001)). Where an employer asserts a legitimate and substantial business justification, the Board then considers whether employees' interests in exercising their Section 7 rights outweigh the employer's asserted justification. *Caesar's Palace*, 336 NLRB at 272.

In the instant case, the Respondent issued a written disciplinary warning to Moss, who then grieved it, shared it with his coworkers, and discussed it with them. He also posted the warning. The judge found, in agreement with the Respondent, that the posting was neither protected nor concerted whether viewed in isolation or in conjunction with Moss' grievance and prior discussion with other employees. We need not decide whether the posting of a disciplinary warning, standing alone, would in other circumstances constitute protected concerted activity. Here, it is clear that the posting of the warning was related to other means of communicating with other employees about it. In accord with the above-mentioned precedent, prohibition of the discussion of discipline reasonably tends to interfere with the exercise of protected Section 7 rights and is therefore unlawful unless outweighed by a legitimate and substantial business justification.[4]

The Respondent asserts that it had a legitimate and substantial business justification for requiring Moss to remove his posted warning, namely "removing open displays of insubordination because such displays are disruptive and undermine management's authority." The Respondent argues that this justification outweighed Moss's Section 7 rights because he continued openly discussing his discipline with coworkers, demonstrating "exceedingly minimal" interference with those rights. In other words, the Respondent effectively contends that by labeling certain conduct as insubordination, it has the right to pick and choose the means by which Moss and coworkers could communicate about his discipline. We disagree, and more to the point, we find that the Respondent has provided no factual basis for deeming the posting to be truly insubordinate. Accordingly, we conclude that the Respondent unlawfully threatened Moss.

B. The Oral Promulgation of an Unlawful Work Rule

The judge found that the Respondent "did not promulgate a rule of general applicability" when Schaefer instructed Moss to take down his posted disciplinary warning, under threat of suspension, in the presence of four employee stewards.[5] Relying on *Teachers AFT New Mexico*, 360 NLRB No. 59, slip op. at 1 fn. 3 (2014), the judge determined that the instruction to remove the posting "was directed solely to Moss" and that "[t]here is no reason to believe that anyone understood either objectively or subjectively that Schaefer's statements were applicable to anyone other than Moss" or to any situation other than Moss's posting. In *Teachers AFT New Mexico*, the Board concluded that no work rule was orally promulgated based on certain statements because the record did not show that those statements "were communicated to any other employees or would reasonably be construed as establishing a new rule or policy for all employees." Id. (citations omitted).

Here, the direction to Moss to remove his posting was communicated in the presence of four employee stew-

[4] The Respondent contends that the General Counsel failed to raise before the judge, and therefore waived, the argument that the threat to Moss violated Sec. 8(a)(1) without regard to whether his posting of the warning was protected concerted activity. Although the complaint alleges that Moss engaged in protected concerted activity by posting his written warning and that the Respondent unlawfully threatened him with suspension because of that conduct, the complaint's language is broad enough to encompass a finding that the threat premised on the activity of posting the warning was unlawful even if not concerted. Further, the General Counsel clearly delineated the separate theories in his posthearing brief to the judge, arguing that the threat to Moss "served as an unlawful restriction on the right of an employee to communicate about disciplinary matters, which cannot be disturbed absent a legitimate and substantial business justification," before separately contending that the Respondent had "threatened to discipline Moss for engaging in protected concerted activity." Furthermore, "[i]t is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Here, the allegations are undoubtedly closely connected as they turn on precisely the same facts. Nor is there support for a finding that the issues were not fully litigated; indeed, the Respondent does not contend that it would have presented its case any differently with the benefit of additional notice of the General Counsel's legal theory. We find, therefore, that the General Counsel's argument was timely raised and not waived.

[5] The Respondent's contention that the parties' stipulation—"Central States does not maintain any policy or rule, written or otherwise, regarding posting of disciplinary notices."—precludes finding a work-rule violation is without merit. The judge did not interpret the stipulation to defeat the work-rule complaint allegation, and the Respondent did not except to this interpretation. In fact, the Respondent filed no exceptions in this case.

ards, and, as Schaefer acknowledged, "there was some discussion in the room with the union stewards about . . . whether he [Moss] needed to bring that [the posted warning] down or not."[6] The stewards would reasonably assume from this discussion that, implicit in Schaefer's instruction to Moss, was a warning that the Respondent would react similarly were another employee to post written discipline. Indeed, during the hearing before the judge, Schaefer admitted his "view" that Moss's warning "should not be posted because it is a private matter between the employee and the manager."[7] Accordingly, the Respondent's threat to Moss was "communicated to . . . other employees" and "would reasonably be construed as establishing a new rule or policy for all employees." See *Teachers AFT New Mexico*, 360 NRLB No. 59, slip op. at 1 fn. 3. Under the circumstances of this case, we therefore conclude that the Respondent effectively promulgated an unlawful rule prohibiting employees from discussing their discipline through the physical posting of such discipline.[8]

III. AMENDED CONCLUSIONS OF LAW

Delete the Conclusions of Law in the judge's decision and substitute the following.

"1. The Respondent violated Section 8(a)(1) of the Act by ordering Frederick Allen Moss to take down his posted disciplinary warning under threat of suspension."

"2. The Respondent violated Section 8(a)(1) of the Act by orally promulgating an unlawful rule prohibiting employees from posting, in their work area, written disciplinary warnings issued to them by the Respondent."

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has orally promulgated an unlawful work rule prohibiting employees from posting, in their work area, written disciplinary warnings the Respondent issued to them, we shall order the Respondent to rescind that rule.

ORDER

The National Labor Relations Board orders that the Respondent, Central States Southeast and Southwest Areas, Health & Welfare and Pension Funds, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discipline if they refuse to remove postings of prior written discipline received from the Respondent.

(b) Promulgating or maintaining a rule prohibiting employees from posting, in their work area, written disciplinary warnings issued to them by the Respondent.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rule prohibiting employees from posting, in their work area, written disciplinary warnings issued to them by the Respondent.

(b) Within 14 days after service by the Region, post at its Chicago, Illinois facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 15, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[6] Tr. 71.

[7] Tr. 76.

[8] Member Johnson would affirm the judge's dismissal of the work-rule allegation. In his view, Schaefer's testimony that there was "some discussion" among the stewards regarding whether Moss needed to remove his posted disciplinary warning is vague and does not justify the conclusion that the Board reaches. Rather, this testimony demonstrates, at most, that the stewards were advocating for Moss's Sec. 7 right to post his disciplinary warning under the circumstances present in this case. Given that Schaefer directed his removal instruction solely to Moss and referred only to Moss's specific posting, there is insufficient evidence to conclude that employees would reasonably construe the instruction as the promulgation of a general rule.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. August 4, 2015

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discipline if you refuse to remove postings of prior written discipline received from us.

WE WILL NOT issue or maintain a rule prohibiting you from posting, in your work area, written disciplinary warnings issued to you.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the rule prohibiting employees from posting, in their work area, written disciplinary warnings issued to them.

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS, HEALTH & WELFARE AND PENSION FUNDS

The Board's decision can be found at www.nlrb.gov/case/13-CA-117018 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Jason Patterson, Esq. for the General Counsel.
Albert M. Madden and *Andrew J. Herink, Esqs.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chicago, Illinois, on April 22, 2014. Teamsters Local 743 filed the charge in this matter on November 14, 2013. The General Counsel issued the complaint on February 18, 2014.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent administers the health, welfare and pensions plans of various employers, including United Parcel Service. Respondent provides services in excess of $50,000 to employers who were directly engaged in interstate commerce. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by threatening employee Frederick Allen Moss with a 3-day suspension unless he removed a written disciplinary warning that Moss had posted in his work area. It also alleges that by Respondent violated Section 8(a)(1) by promulgating a rule prohibiting employees from posting written disciplinary warnings in their work area.

Frederick Allen Moss has worked in Respondent's call-in center for 21 years. His job is to answer inquiries by fund participants. For the last 7 years Cynthia McGinnis has supervised Moss. McGinnis considers Moss to be a marginal employee at best.

During a meeting for a group of employees on June 12, 2013, Moss apparently used a tablet (electronic device) and failed to stop using it when McGinnis told him to do so. On June 13, 2013, McGinnis held a meeting with Moss and Union Steward Richard Delgado. At this meeting she issued Moss a

written warning for insubordination for failing to put away the tablet the day before. Immediately after the meeting Moss discussed the warning with union steward Delgado. The Union filed a grievance concerning the warning on June 13.

On June 14, Moss showed the warning to several other employees. Then he laminated the written warning and posted it in his cubicle, next to his computer. The laminated warning was visible to other employees entering his cubicle or standing at the entry to the cubicle. He also at this time, or previously, posted his quarterly production statistics, which included a note from McGinnis critical of his performance.

At a grievance meeting on August 15, 2013, McGinnis complained that Moss was being disrespectful and insubordinate to her by posting the written disciplinary warning. William Schaefer, the Group Director of Respondent's participant services, told Moss that if he did not remove the warning from where he posted it, he would suspend Moss for 3 days. The Union advised Moss to comply with Schaefer's demand. Moss went to his cubicle and took down the warning notice.

Analysis

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* . . . (Emphasis added)."

In *Myers Industries (Myers 1)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers 11)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action, *Whittaker Corp*., 289 NLRB 933 (1988); *Mushroom Transportation Co.*, 330 F.2d 683, 685 (3d Cir. 1964). The object of inducing group action need not be express.

Additionally, the Board held in *Amelio's*, 301 NLRB 182 (1991), that in order to present a prima facie case that an employer has disciplined or discharged an employee in violation of Section 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity.

I conclude that Moss did not engage in protected concerted activity by posting his written disciplinary warning. First of all, Moss was not enlisting the support of his fellow employees and was not posting his disciplinary action with a view of inducing group action. The Union had already filed a grievance on his behalf when he posted the warning. There is no evidence that Moss was soliciting support for his grievance by posting the warning.

The General Counsel contends that Moss' posting of the warning was a "logical outgrowth" of the filing of the grievance. I disagree. There is no evidence that Moss was seeking the support of other employees in the grievance procedure, or that posting the warning advanced his cause in the grievance process in any way. Moss did not post the grievance; thus I conclude that the relationship between filing the grievance and posting the warning is tenuous at best.

Unlike the employees in the cases cited by the General Counsel at page 6 of his brief, Moss was not posting his warning to support any union activity. For example, this case is distinguishable from *Lucky Cab Co.,* 360 NLRB No. 43 (2014), slip opinion pages 3–4, and 7, in that employee Geberselasa, unlike Moss, had clearly engaged in protected union activity before being told not to discuss her discharge.

The fact that several employees may have asked Moss about his written warning and that he showed it to them does not mean that he was initiating or inducing group action. There is no evidence in this record, for example, that any other employees wanted the freedom to use their electronic devices in business meetings. There is also no evidence that Moss was seeking the support of other employees to protest unfair disciplinary practices in general. The subject matter of Moss' posting was a matter that concerned only Moss.

I further conclude that Moss' discipline did not become a matter of common concern simply because the Union filed a grievance about it. The grievance (Jt. Exh. 2), cites Section 2 of the collective-bargaining agreement, the nondiscrimination provision, as the basis for the grievance. This is no evidence that the Union claimed that Moss was disciplined in a discriminatory matter. I assume it grieved the warning on the theory that it was administered "without just cause." Thus, I conclude that the grievance was simply processed on the theory that Moss' conduct, which only concerned himself, was insufficient to warrant a written warning.

Moss testified that he posted his warning because "a lot of people had come over asking about it." McGinnis believes he did so to mock her. Even assuming that Moss posted the warning in response to the inquiries of other employees, there is no evidence that their inquiries were motivated by anything other than idle curiosity. There is no evidence that they sought to make common cause with Moss about anything, or that he was seeking their support for any matter of common concern.

The General Counsel at page 8 of his brief also cites *Westside Community Mental Health Center,* 327 NLRB 661, 666 (1999), for the proposition that Respondent's threat to Moss inhibited "other employees to obtain information that could prove useful in challenging discipline they may facing." The Board's concern in that case was inhibiting the disciplined employees from obtaining such information, rather than inhibiting other employees from obtaining information to defend themselves in other disciplinary situations. Regardless, either rationale is inapplicable to this case. Moss' posting neither could assist him in defending himself nor have assisted other employees in defending themselves in disciplinary situations that might arise in the future.

Respondent did not violate the Act in promulgating an unlawful work rule

The General Counsel relies heavily on *Verizon Wireless,* 349 NLRB 640, 658–659 (2007), in arguing that Respondent prom-

ulgated an unlawful work rule by telling Moss to take down his laminated warning or face suspension. That case is distinguishable in that the discipline involved in that case was imposed for protected activity. Moreover, I find that Respondent did not promulgate a rule of general applicability. Its admonition was directed solely to Moss. A statement directed at only one employee cannot generally be considered to constitute the promulgation of a work rule, *American Federation of Teachers New Mexico,* 360 NLRB No. 59 fn. 3 (2014). The only other employees present when Schaefer threatened Moss were four union stewards. Their presence at the grievance meeting does not turn Schaefer's statement into a work rule. There is no reason to believe that anyone understood either objectively or subjectively that Schaefer's statements were applicable to anyone other than Moss, or applied to any situation other than the particular written warning Moss received on June 13. There is no evidence that Schaefer's alleged rule was disseminated to employees, other than those at the August 15 meeting, either by Respondent or by the Charging Party Union.

This is a case that should never have been litigated. Respondent overreacted to Moss' conduct. It is hard to understand how Respondent considered Moss' posting the warning to be disrespectful or harassment of McGinnis. The warning, if anything, reflected poorly on Moss, not McGinnis. Moss' conduct did not warrant the threat of a 3-day suspension. However, the Union should not have filed the charge and the General Counsel should not have issued the complaint. Moss' conduct is so remotely related to the rights protected by the Act, that Respondent's reaction to it is something with which the Board should not be concerned. As the Board stated in a somewhat different context in *American Federation of Musicians, Local 76 (Jimmy Wakely Show),* 202 NLRB 620, 621 (1973):

> The Board's rising case load and the problems involved in handling it could be alleviated if cases of this type were not processed.

CONCLUSIONS OF LAW

Frederick Moss did not engage in protected concerted activity by posting his written disciplinary warning in his office.

Respondent did not violate Section 8(a)(1) in threatening Moss with a three-day suspension if he did not take the warning down.

Respondent did not violate the Act in promulgating an unlawful work rule.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The complaint is dismissed.

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[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.